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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, Plaintiff, v. ROGERS C. B. MORTON, et al., Defendants.	Civil Action No. 51464 WTS PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO AMEND THE COMPLAINT

I. The Proposed Amendments Allege Sufficient Facts For Standing to Sue

The Sierra Club has had a substantial and continuing interest in the Mineral King valley since the beginning of this century. Through the years the Sierra Club has used the valley as a portal for its longer trips into the Sierra Nevada wilderness. Furthermore, the Club's members have used Mineral King valley on countless occasions for shorter outings. Sometimes these outings are formally organized and led by the Club's chapters; on other occasions they simply involve informal groups of friends or family. The Club is now joined by the Mineral King District Association and several individuals. The Association represents cabin owners at Mineral King. The individuals are cabin owners or persons who use Mineral King heavily for hiking, camping, etc. These interests are clearly sufficient to meet the Supreme Court's test for standing

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recently announced in this case. Sierra Club v. Morton, 40 U. S. L. W. 4397, (1972).

The Sierra Club and its members consider Mineral King valley to be of crucial importance to their interests in the wilderness of the Sierra Nevada. As a result they have campaigned since the beginning of the century to have the valley included in the Sequoia National Park. Although the Club has never succeeded in this goal, it did manage to convince Congress in 1926 to set the valley aside as the Sequoia National Game Refuge. 53 Stat. 1431, 16 U.S.C. §688.

The defendants propose to turn the Sequoia National Game Refuge over to a private developer, Walt Disney Productions, Inc., who then plans to convert the Refuge into an expensive private resort complex of hotels, ski lifts, reservoirs, golf courses, stables, restaurants, etc. Such developments would end the use of Mineral King as a public game refuge and as a place for unmechanized recreation of the type presently pursued by the Club, its members, and by the public generally. In addition, the resort development would require the use of Sequoia National Park for access routes and power lines and would commercially exploit the wilderness of the Park which surrounds the Game Refuge on three sides. As a result, the character of the Game Refuge and the Park would be greatly altered and the Club's interests there would be impaired. This injury to the interests of the Club and the proposed plaintiffs is sufficient for legal action under the Supreme Court's opinion in this case. 40 U.S.L.W. 4397, 4400.

II. The Sierra Club Has Neither Caused Undue Delay Nor Prejudiced Defendants.

Following the filing of the complaint, this case moved swiftly in this Court. Even so, this Court found it necessary to issue a preliminary injunction on August 4, 1969, to maintain

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the status quo until it could make a final determination on the merits. At this point the defendants undertook a dilatory course of action, delaying the disposition of this case for reasons known only to themselves. Thus, rather than allow the case to proceed to a final determination on the merits, defendants took a time-consuming interlocutory appeal to the Ninth Circuit. This led, ultimately, to Supreme Court review and the loss of three years.

After reviewing this case, the Supreme Court issued an opinion defining the law of standing for this type of case. The Court's opinion sets forth tests which differ from both the rulings of this Court and of the Ninth Circuit herein. Obviously, because the Supreme Court established a new test, that Court suggested that the Sierra Club move to amend its complaint in this Court. 40 U.S.L.W. at 4400, n. 8. In line with that suggestion, the Club has moved to amend its complaint.

Despite the passage of three years, Disney Productions apparently is not prepared to proceed immediately with its proposed resort project. Disney proposes certain modifications of the project to the defendants. Thus, Disney wishes to eliminate the proposed highway through Sequoia National Park and replace it with a railroad. (Disney announced several proposed changes by a press release of May 3, 1972.)

The defendants, in their Opposition to Sierra Club's Motion to Amend take the position that the Club has unduly delayed this case to the prejudice of the defendants. In fact, however, the Club has not caused the delay nor are defendants prejudiced. It is the defendants themselves who have delayed this case by indulging in a time-consuming interlocutory appeal. But for defendant's interlocutory appeal, there would have been a final determination on the merits long ago.

Furthermore, it is clear that the delay did not prejudice

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the defendants. Now, three years later, it would appear that Disney is still planning its project and is not yet prepared to proceed. In this regard, it is important to note that this Court's preliminary injunction was carefully drawn to permit Disney and defendants to continue planning activities. 1/

Defendants suggestion that Sierra Club deliberately brought this case on the wrong theory of standing to cause delay is ridiculous. The Club admits that it did not foresee in 1969 the formulation for standing issued by the Supreme Court in 1972. This lack of foresight, however, is understandable. All three courts that have considered this case have ruled differently on standing. As the Supreme Court said in another recent case:

> "Standing is an aspect of justiciability and, as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability. Standing has been called one of 'the most amorphous [concepts] in the entire domain of public law.'" Flast v. Cohen, 392 U.S. 83, 98 (1968).

Indeed, this case is the first in which the Supreme Court has considered "what must be alleged by persons who claim injury of a non-economic nature to interests that are widely shared." 40 U.S.L.W. at 4399. The Club had relied on the theory that it could bring such a suit as a "private Attorney General" under a line of cases developing in that direction. See, e.g., 40 U.S. L.W. at 4401; and see, e.g., Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir., 1970); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (1965). At the

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1/ The defendant's additional charge that the Sierra Club waited for four years after it knew of the proposal to build the ski development to bring suit is also without merit. While it is true that Disney made its proposals in 1965, it was not until 1969 that the defendants indicated their approval of the project. Prior to those approvals this matter was not ripe for judicial review and the Sierra Club quite properly attempted to deal with the defendants administratively.

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time this case was argued in the Supreme Court only the Ninth Circuit had rejected the Club's authorities. The Supreme Court, as it turned out, rejected both the "private Attorney General" line of authority and the Ninth Circuit's position and established a new test. As a result the Club is following the Supreme Court's suggestion that it amend its complaint. The necessity to comply with a newly formulated legal doctrine, however, does not mean the Sierra Club acted culpably in not foreseeing the new test. 2/

III. This Case Has Not Been Decided on the Merits.

Last of all, defendants take the position that this Court should not allow plaintiff's amendment because the Ninth Circuit has already decided the case on the merits. The Ninth Circuit, however, only ruled on a preliminary injunction. Rulings on preliminary injunctions are not binding on final determinations.

> "The general rule is that the decision of either the trial or appellate court in granting or denying a temporary injunction does not estop the parties or the court as to the merits of the case." 7 Moore, Federal Practice ¶65.21, 1703.

The Ninth Circuit has stated:

> "The findings of fact and conclusions of law are all preliminary and are not to be construed as foreclosing any findings and conclusions as to the contrary based upon

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2/ The defendants would have this Court believe that the Sierra Club's failure to amend its complaint in the higher courts proves it sought undue delay. The Club, however, had no reason to amend prior to the Ninth Circuit's ruling. Furthermore, after the Ninth Circuit ruled, because of the extreme nature of that Court's ruling, there was no amendment the Club could have proposed that would have been sufficient. The Supreme Court, in rejecting the Ninth Circuit's test for standing suggested that the Club move to amend in the District Court. This motion was thereafter noticed at the earliest possible moment on the very day this case was reopened following remand from above.

The defendants also suggest that the Club is more interested in some abstract "test case" than in Mineral King itself. This charge is unsupported nonsense. The Club will show, given the opportunity, that it is vitally interested in Mineral King itself and that it has been since the turn of the century.

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> evidence which may be received at the trial on the merits." Ross-Whitney Corp. v. Smith, Kline & French Lab., 207 F.2d 190, 199 (9th Cir., 1953).

Also see Young v. Motion Picture Association of America, 299 F.2d 119, 121 (D.C. Cir., 1962); Hamilton Watch Co. v. Benrus Co., 206 F.2d 738, 743 (2d Cir., 1953); Hunter v. Atchison, 188 F.2d 294, 298-299 (7th Cir., 1951). The Eighth Circuit stated in Benson Hotel Corp. v. Woods, 168 F.2d 694, 697 (1948):

> "The decision of the trial court in granting a motion for preliminary injunction will not estop either of the parties on the trial of the case on its merits, nor would any determination of the merits by the court on appeal from such injunction be binding on the trial court or upon either of the parties in considering and determining the merits of the controversy."

The Ninth Circuit recognized it was not determining the merits of this case and said at 433 F.2d 24, 33-34:

> "We recognize that in appraising these issues even on a preliminary basis, our function is not to make an original judgment or to make a final decision on the merits. See, e.g., Public Service Commission of Wisconsin v. Wisconsin Tel. Co., 289 U.S. 67,70 (1933); Industrial Bank of Washington v. Tobriner, 405 F.2d 1321, 1324 (D.C. Cir. 1968)."

The reason, of course, is that the merits cannot be determined until the facts are fully known, which will not occur until after full discovery and trial. For example, it is plaintiff's contention that the use of Mineral King as a ski resort will substantially impair and subvert its statutory function as a game refuge. Plaintiffs intend to prove this contention at trial. Clearly, whether the defendants have or have not carried out their statutory duty in this regard cannot be determined prior to the completion of discovery and trial. Furthermore, as we have noted above, the project appears to

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have undergone substantial alteration. Thus, there appears to be a change in the facts since the Ninth Circuit ruled. The extent and impact of these changes have not yet been developed.

In this regard it is well to note that the Supreme Court stated that it did not consider the merits. 40 U.S.L.W. at 4402. In suggesting that the Club amend its complaint, the Supreme Court has obviously assumed that the general rule applies: that rulings on preliminary injunctions are not binding on final determination and that this Court could allow an amendment and consider the matter afresh. Any other interpretation would render the Supreme Court's suggestion meaningless.

IV. Defendants Should Be Allowed to Amend The Complaint to Allege a Claim Under the National Environmental Policy Act.

Defendants oppose the inclusion of the Sierra Club's new claim for relief under the National Environmental Policy Act (NEPA). They take the position that they plan to comply with NEPA and that to allow the claim to be added would make this a new lawsuit. NEPA, however, is simply a new law passed in 1970 which applies to the very permits which are the subject of this suit. So far, defendants have not complied with NEPA. Furthermore, compliance involves complex legal questions over which the parties differ.

The addition of the NEPA claim is not plaintiff's main reason for amending its complaint. Such an amendment now, however, would avoid the necessity of a second motion to amend later or a second lawsuit.

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In conclusion, no prejudice to the defendants appears and, as a result, the motion to amend should be granted.

DATED:

June 29, 1972

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CERTIFICATE OF SERVICE

The undersigned certifies that he is an active member of the State Bar of California; that he is not a party to the within cause; that his business address is 311 California Street, Suite 311, San Francisco, California 94104; that he caused an envelope to be delivered to each of the following named persons at their respective addresses; that he enclosed and sealed in each envelope a copy of the foregoing and attached:

Plaintiff's Reply Memorandum in Support Of Motion To Amend The Complaint

on June 29, 1972.

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CERTIFICATE OF SERVICE BY MAIL

The undersigned certifies that he is an active member of the State Bar of California; that he is not a party to the within cause; that his business address is 311 California Street, Suite 311, San Francisco, California 94104; that he caused an envelope to be addressed to each of the following named persons; that he enclosed and sealed in each envelope a copy of the foregoing and attached:

1. Notice of Motion and Motion to Amend Complaint,
2. Amended Complaint,
3. Memorandum of Points and Authorities in Support of Motion to Amend Complaint,
4. Affidavit of J. Michael McCloskey of May 31, 1972;

and deposited each envelope with postage fully prepaid in the United States Mail at San Francisco, California on June 2, 1972.

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